

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION
JOHN DASKALIS	:	DTA NO. 819503
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the New York City Administrative Code for the	:	
Period Ended June 30, 2001.	:	

Petitioner, John Daskalis, 36-45 202nd Street, Bayside, New York 11361-1119, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the period ended June 30, 2001.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed October 9, 2003, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). On December 4, 2003, petitioner appeared by his representative, Eric W. Olson, Esq., and submitted an affidavit in opposition to the Division's motion, beginning the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, John Daskalis, a Notice of Deficiency, dated January 22, 2002, addressed to petitioner at “36-45 202 Street, Bayside, NY 11361-1119.” The notice bore assessment identification number L-020502769-4 and asserted a total amount due of \$430,000.00. As indicated by the computation summary section of the notice, this amount consisted wholly of withholding tax for the period ended March 31, 2001.¹

2. On February 11, 2003, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the Notice of Deficiency dated January 22, 2002.

3. On February 28, 2003, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on January 22, 2002, but the request was not received until February 14, 2003, or in excess of 90 days, the request is late filed.

4. Notices of deficiency, such as the one at issue herein, were computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a certified mail record (“CMR”). The CMR listed those taxpayers to whom notices of deficiency were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service (“USPS”) through return of the CMR to the CARTS Control Unit.

¹Although petitioner protested two notices in his petition, the Division has conceded in its answer that the second notice, number L-020502768-5, had been paid in full and was no longer in issue.

5. Each computer-generated notice of deficiency was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The CMR listed an initial date (the date of its printing) in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date of January 9, 2002 which was manually changed to January 22, 2002.

6. After a notice of deficiency was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighed and sealed each envelope and affixed postage and fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the USPS and affixed a dated postmark or his signature or initials, or both, to the CMR.

7. In the ordinary course of business, a Mail Processing Center employee picked up the CMR from the USPS on the following day and returned it to the CARTS Control Unit.

8. In the instant case, the CMR was a 34-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." All pages were connected when the document was delivered into the possession of the USPS and

remained connected when the postmarked document was returned after mailing. This CMR listed 371 control numbers. Each such certified control number was assigned to an item of mail listed on the 34 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

9. Information regarding the Notices of Deficiency issued to petitioner was contained on page 14 of the CMR. Corresponding to certified control number 7104 1002 9739 0066 9181 was notice number L 020502768 and corresponding to certified control number 7104 1002 9739 0066 9198 was notice number L 020502769, along with petitioner's name and address, which was identical to that listed on the subject Notice of Deficiency.²

10. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated January 22, 2002, and the initials of the postal employee, verifying receipt of the items.

11. The last page of the CMR, page 34, contained a preprinted entry of "371" corresponding to the heading "Total Pieces and Amounts Listed." This preprinted entry was manually circled and beneath it was the aforementioned postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee. These same initials appeared on each page of the CMR.

12. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the "371" indicated that all 371 pieces listed on the CMR were received at the post office.

13. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

²As noted above, the former notice is not in issue herein.

14. The facts set forth above in Findings of Fact “4” through “13” were established through the affidavits of Geraldine Mahon and Daniel LaFar. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of deficiency. Mr. LaFar was employed as a Principal Mail and Supply Clerk in the Division’s Mail Processing Center. Mr. LaFar’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

15. The address on the subject Notice of Deficiency, 36-45 202 Street, Bayside, NY 11361-1119, was the same as the address provided on petitioner’s New York State Resident Income Tax Return for the year 2000, filed electronically on April 15, 2001, the last return filed before the notices herein were issued. In addition, the same address was used by petitioner on his power of attorney form, dated August 16, 2000.

16. Petitioner does not deny receiving the notices of deficiency herein, but claims he received them in June of 2002.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner’s response to the Division’s motion was an affidavit in which he did not deny receiving the notice in issue. Rather, petitioner averred merely that he did not receive the notice for approximately six months after it was mailed by the Division. Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and LaFar affidavits;

consequently, those facts may be deemed admitted (*see, Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania, Inc.*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Division of Taxation to mail a Notice of Deficiency to a taxpayer where “the tax commission determines that there is a deficiency.” This section further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.” Tax Law § 691(b) provides that a taxpayer’s “last known address” shall be the address given in the last return filed by him, unless subsequently thereto the taxpayer has notified the Division of a change in address. In this case, the record is clear that the address listed on the subject Notice of Deficiency was petitioner’s last known address as indicated by the address provided on his New York State Resident Income Tax Return for the year 2000.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law §§ 689[c]; 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. (*See Matter of Novar TV*

& Air Conditioner Sales and Service, Inc., Tax Appeals Tribunal, May 23, 1991 [where the Tax Appeals Tribunal stated that “where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination”].) Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. LaFar, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency.

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Deficiency in issue was mailed to petitioner on January 22, 2002. Specifically, this 34-page document listed certified control numbers with corresponding names and addresses, including petitioner’s control number, notice of deficiency number, name and address. All 34 pages of the CMR bore a U.S. Postal Service postmark dated January 22, 2002. Additionally, as part of the standard procedure for the issuance of notices of deficiency, a postal employee initialed page 34 of the CMR and circled “371” on that page to indicate receipt by the post office of all 371 pieces of mail listed thereon (*cf., Matter of Roland*, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was

no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject Notice of Deficiency on January 22, 2002.

H. Petitioner's request for conciliation conference was filed on February 11, 2003, over a year after the date of mailing of the instant Notice of Deficiency. The request was therefore untimely filed (*see*, Tax Law §§ 689[c]; 170[3-a][a]; 20 NYCRR 3000.3[c]).

I. Petitioner's unsupported contention that he did not receive the notice in issue until June of 2002 is of no consequence. First, unsubstantiated allegations or assertions are insufficient to raise an issue of fact. (*Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309.) Second, the statement does not rebut the presumption of delivery established through proof of a standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing. (*See, Matter of Accardo, supra.*)

Having established both the fact and date of mailing (*Matter of Katz, supra*) of the notice to petitioner at his last known address, the Division is entitled to summary determination herein.

I. The petition of John Daskalis is dismissed.

DATED: Troy, New York
January 15, 2004

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE